PACIFIC INTER-LINK SDN BHD

v.

PEMILIK KAPAL ATAU VESEL "MAKATSARIJA"

HIGH COURT MALAYA, JOHOR BAHRU
SULONG MATJERAIE JC
[ADMIRALTY IN REM NO: 27-11-1999]
1 NOVEMBER 1999

CIVIL PROCEDURE: *Affidavits - Affidavit in support of application - Time frame for filing and service - Order 32 r. 13(2) Rules of the High Court 1980 - 14 days from date of filing of application - Effect of non-compliance - Whether curable*

CIVIL PROCEDURE: *Affidavits - Counsel affirming affidavit - Whether proper - Whether deponent has personal knowledge*

CIVIL PROCEDURE: *Affidavits - Further affidavits - Whether leave of court necessary - Whether opponent given due notice*

The defendant filed a summons-in-chambers for an order that all proceedings be stayed under s. 6 Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985. This application was supported by an affidavit (encl 17) affirmed by the defendant's counsel which was filed into court on 20 August 1999 and served on the plaintiff on 10 September 1999. At the hearing of the application, counsel for the plaintiff raised some preliminary objections, *ie*, that (i) the supporting affidavit did not comply with O. 32 r. 13(2) Rules of the High Court 1980 ('RHC') in that it was not served on the plaintiff within 14 days from the date of the filing of the application, (ii) the affidavit was based on hearsay evidence, and (iii) solicitors themselves should not file contentious affidavits in pending applications. The matter was then adjourned to another date for the defendant to reply to the objections. On the appointed day, counsel for the defendant notified the court that he had filed a further affidavit (encl 27). This affidavit was also affirmed by the defendant's counsel. The plaintiff objected to encl 27 as no leave was obtained for the filing of a further affidavit.

Held:

[1] Counsels should not affirm contentious affidavits for they are not the litigants.

[2] Enclosure 17 was inadmissible as there was not an iota of evidence produced that showed that the deponent was involved and had personal knowledge of the facts in dispute.

[3] Where the rules of court provide for a specific manner and time frame for the service of an affidavit intended to be used in support of an application, these rules must be fully observed and complied with. This is an absolute obligation where O. 2 r. 1 of the RHC is of no assistance.

[5] Since the plaintiff had completed its submission and no leave of the court was requested by the defendant for the filing of further affidavits, the plaintiff was not given due notice. The court therefore could not allow encl 27 to be used.

[Plaintiff's objections upheld; defendant's application dismissed.]

Case(s) referred to:

Dynacast (S) Pte Ltd v. Lim Meng Siang & Ors [1989] 2 CLJ 1116 ***(refd)***
Golden Ocean Assurance Ltd & World Mariner Shipping SA v. Christopher Julian Martin & Ors (The 'Golden Mariner') [1990] 2 Lloyd's Law Report 215 ***(refd)***
Government of State of Pahang v. Tengku Abdul Aziz & Anor [1978] 2 MLJ 34 ***(refd)***
Kassim Sulong & Anor v. Guthrie Estates Holdings Ltd & Ors [1994] 3 CLJ 186 ***(refd)***
KS Chua & Co v. Chui Miang Chew [1996] 2 CLJ 676 ***(foll)***
Lim Yoon Loy & Ors v. Lee Lan [1990] 2 MLJ 425 ***(refd)***
Lori Malaysia Bhd (Interim Receiver) v. Arab Finance Bhd [1999] 2 CLJ 997 ***(refd)***
Maritime (Pte) Ltd v. ETPM SA [1988] 2 MLJ 289 ***(refd)***
Million Group Credit Sdn Bhd v. Lee Shoo Khoon [1985] 1 CLJ 181 ***(refd)***
R v. Secretary of State for India in Council & Ors, ex p Ezekiel [1941] 2 KB ***(refd)***
Structural Concrete Sdn Bhd & Ors v. Wing Tiek Holdings Bhd [1997] 1 CLJ 300 ***(foll)***
Sundaram v. Chew Choo Khoon [1968] 2 MLJ 40 ***(refd)***
Tan Pow & Anak-Anak Sdn Bhd v. Pelasari Sdn Bhd [1999] 1 CLJ 165 ***(refd)***
'The Expo Agsa'; Continental Grain Co v. Owners of the Ship or vessel "Evpo Agsa" [1992] 2 SLR 487 ***(refd)***
Ting Hua Yiew v. Ace Commercial Enterprise Sdn Bhd [1996] 2 MLJ 678 ***(foll)***

Legislation referred to:

Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985, s. 6
Rules of the High Court 1980, O. 2 r. 1, O. 32 r. 13(2), O. 41 r. 5(2)

For the plaintiff - Mathew Kurien (Raj Sativale with him); M/s Sativale & Assoc
For the defendant - Philip Teoh (KC Lu with him); M/s David Chong & Co

Reported by Izzaty Izzuddin

JUDGMENT

Sulong Matjeraie JC:

At encl. 18 the defendant filed in a summons-in-chambers applying to this court for an order that all further proceedings be stayed under s. 6 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320). The basis of their application is that any claim between the parties here are to be referred to arbitration in London pursuant to the terms of a charterparty dated 2 June 1999.

Arguments For The Plaintiff

At the hearing on 18 October 1999 learned counsel for the plaintiff, Mr. Mathew Kurien made two preliminary objections on the affidavit filed:

(1) Non compliance with O. 32 r. 13(2) of the Rules of High Court 1980 (RHC); and

(2) The affidavit was based on hearsay.

Enclosure 18 was supported by an affidavit deposed by Mr. Philip Teoh Oon Teong (Mr. Philip Teoh), the learned counsel for the defendant affirmed on 18 August 1999 (encl. 17). This affidavit was filed into this court on 20 August 1999 and was only served on the plaintiff's solicitors on 10 September 1999.

Order 32 r. 13(2) says:

> 13(2) Save as otherwise provided in these rules –
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
>
> (b) –

From the facts, since the affidavit was filed on 20 August 1999 then 14 days later would mean that the said affidavit must be served onto the plaintiff on or before 2 September 1999 and not 10 September 1999.

The word 'must' in this rule has been held by Abdul Kadir Sulaiman J as a word of 'absolute obligation' in *Ting Hua Yiew v. Ace Commercial Enterprise Sdn. Bhd.* [1996] 2 MLJ 678 @ 686 where it was held that the failure in serving the affidavit within the time limit allowed by the rule rendered the said affidavit inadmissible. It was also held that O. 2 r. 1 of the RHC was of no help.

The Court of Appeal had an occasion to interpret the words used in O. 32 r. 13(2) of the RHC in the case of *Structural Concrete Sdn. Bhd & Ors v. Wing Tiek Holdings Bhd* [1997] 1 MLJ 581 where Mahadev Shankar JCA at p. 586 said that "... the critical words in O. 32 r. 13(2) – for the purposes of computation of time – are 'within 14 days from the date of the filing of the application' ...".

Failure to comply means that the courts are not obliged and indeed are precluded from considering any affidavit filed out of the 14 day period unless applications to file those affidavits out of time formally have been made and granted by the courts, see *KS Chua & Co v. Chui Miang Chew* [1996] 2 CLJ 676; [1995] 4 MLJ 436.

The second preliminary objection of the plaintiff relates to the fact that the affidavits of the defendant affirmed on 18 August 1999 and 5 October 1999 were both deposed by Mr. Philip Teoh, learned counsel for the defendant. It is the contention of the plaintiff that counsel should not affirm contentious affidavit, see *Tan Pow & Anak-Anak Sdn. Bhd. v. Pelasari Sdn. Bhd.* [1999] 1 CLJ 165 where Hashim Yusoff J quoted with approval what M. Shankar J (as he was then) said in *Million Group Credit Sdn. Bhd. v. Lee Shoo Khoon* [1985] 1 CLJ 181 at p. 184 that 'A second point which needs to be emphasised is that the practice of solicitors themselves filing contentious affidavits in pending applications should be discouraged. The parties are the litigants and it is they who should be giving evidence.' Justice GP Selvam also shared the same view in *'The Evpo Agsa'; Continental Grain Co v. Owners of the Ship or vessel "Evpo Agsa"* [1992] 2 SLR 487 when he quoted what Humpreys J in *R v. Secretary of State for India in Council & Ors, ex p Ezekiel* [1941] 2 KB said "... A barrister may be briefed as counsel in a case or he may be a witness in a case. He should not act as counsel and witness in the same case." Those must equally apply to counsel making affidavits where facts are in dispute.

The plaintiff also emphasised that affidavits could neither be based on hearsay evidence nor should they contain, as is exhibited at PT2 of encl. 17, opinion of law. Where exhibits to the affidavit state an opinion of law, that opinion of law is not admissible. It is the function of the court to decide on question of law, per Zakaria Yatim J (as he was then) in *Kassim bin Sulong & Anor v. Guthrie Estates Holdings Ltd. & Ors* [1994] 3 CLJ 186; [1993] 3 MLJ 303.

At para. 2 of the affidavit, encl. 17, it was deposed by learned counsel for the defendant that the matters stated therein were within his personal knowledge and were true and insofar as the matters stated therein were not within his personal knowledge, they were true to the best of his

information and belief. From the records exhibited by the defendant, regretfully there is no iota of evidence produced to show that the deponent was involved and has personal knowledge on facts that are in dispute. The learned defence counsel represents the defendant, the owners of the ship 'Makatsarija'. The owners of the vessel has entered an unconditional appearance on 22 July 1999 (encl. 8) through the firm of Messrs David Chong & Co. It can also be observed that the parties to the charterparty are the plaintiff and Georgian Shipping Co. (UK) Ltd. as disponent owner and not the defendant, see exh. PT1 in encl. 17.

As such it was argued that learned counsel for the defendant could not be said to be involved in and having personal knowledge of the facts in dispute. Further, counsel for the plaintiff said that although the application for stay is an interlocutory proceeding, it is clear that nothing has been mentioned in the said affidavit which contains statement of information or belief with the sources and grounds thereof.

It cannot be over emphasised here that affidavit may only contain such facts as the deponent is able of his own knowledge to prove. Order 41 r. 5(2) of the RHC provides for an exception where affidavits sworn for interlocutory proceedings may contain statements of information or belief with the sources and grounds thereof. Statements of information or belief have no probative value unless the sources and grounds of the information and belief are revealed, see *Dynacast (S) Pte. Ltd. v. Lim Meng Siang & Ors* [1989] 2 CLJ 1116; [1989] 3 MLJ 456. Failure to identify the sources, the relevant paragraphs of the affidavits become inadmissible as evidence as they are purely hearsay.

The Federal Court in *Lori Malaysia Berhad (Interim Receiver) v. Arab Finance Berhad* [1999] 2 CLJ 997; [1999] 3 AMR 3161 also held that where statements are made by a deponent based on information and belief, these ought not to be looked at all, unless the court can ascertain not only the source of the information and belief but also that the deponent's statement is corroborated by someone who speaks from his own knowledge.

It is the contention of the plaintiff here that learned counsel for the defendant is only a counsel of the defendant and is not otherwise directly involved in this matter and as such he could not possibly have personal knowledge on the facts in dispute.

In view of the above submission learned counsel for the plaintiff urged this court to reject the affidavit of Mr. Philip Teoh.

By agreement of both parties the matter was adjourned to 1 November, 1999 to enable Mr. Philip Teoh to reply to the preliminary objections of the plaintiff.

Arguments for the defendant

On the appointed day learned counsel for the defendant notified this court that they have filed a further affidavit on 28 October 1999 (further affidavit). Again, the further affidavit was deposed by the said learned counsel, Mr. Philip Teoh affirmed on 26 October 1999 (encl. 27). Incidentally, this court was never advised any earlier on his further affidavit during the last hearing on 18 October 1999 let alone giving its blessing. As expected the plaintiff objected to the further affidavit as no leave was ever applied for before this court. The plaintiff said that they were caught by surprise.

In any event the reason offered by the defendant at para. 4 of encl. 27 said that their solicitors accidentally sent all the four copies of the summons-in-chambers and the supporting affidavit from their chambers in Kuala Lumpur to their office in Johor Bahru for filing at the High Court in Johor Bahru.

This reason appear strange for the said summons-in-chambers are made by way of computer printout where additional unsealed copies of which could easily be made and sent onto the plaintiff, had the defendant intended to do so. By so doing the purpose of serving the unsealed copy of the summons and the affidavit in support in giving due notice to the plaintiff of the nature of the application and the grounds supporting the application would have been met. Thereafter the sealed copy of the summons could very well follow.

At para. 5 of encl. 27 the defendant deposed that the summons-in-chambers and the supporting affidavit was filed herein on 20 August 1999 and alleged that the plaintiff's solicitors had been notified through their letter dated 25 August 1999, and a copy thereof was exhibited at exh. PT1. This court cannot help but noticed that the said letter was also written, *inter alia*, to enquire the 'breakdown of the security demand made' in the plaintiff's solicitors letter dated 28 July 1999. It was not written solely for the purpose as envisaged under O. 32 r. 13(2) of the RHC where due notice had been given to the plaintiff of the nature and the grounds supporting the application.

Paragraph 6 of encl. 27 admitted that the sealed copy of the summons-in-chambers together with the supporting affidavit was only served on the plaintiff's solicitors on 10 September 1999.

Paragraph 7 attempted to explaine that the delay was caused by slight misunderstanding between their Kuala Lumpur's and Johor Bahru's offices as well as the delay in returning the documents to Kuala Lumpur. As such it was suggested that no prejudice has been occasioned to the plaintiff (para. 8) and urged the court to exercise its discretion under O. 2 r. 1 of the RHC.

The main thrust of the defendant's argument is that the arbitration clause ought to be highlighted and their application for stay is based in the action for contract under which the plaintiff is claiming. It was argued by learned counsel for the defendant that it is clear from the affidavit of Motaher Saeed Noman (encl. 23) that the issues relevant to this application for stay are contained in the plaintiff's documents which are filed in court. It was also argued that there is nothing the affidavit that is being objected to that does not contain anything that cannot be verified from the court's file or indeed from the plaintiff's documents.

What is interesting however is that there is nothing in the affidavit of Mr. Philip Teoh (encl. 17) which says that his information and belief (para. 2 therein) was based on the plaintiff's document. His argument therefore cannot therefore succeed here.

This court has also examined the authorities provided for by the learned counsel for the defendant and could not see the relevance of the cases of *Maritime (Pte.) Ltd. v. ETPM S.A.* [1988] 2 MLJ 289; *Golden Ocean Assurance Ltd. and World Mariner Shipping S.A. v. Christopher Julian Martin and Others (The 'Golden Mariner')* [1990] Vol. 2 Lloyd's Law Report 215; *Lim Yoon Loy & Ors v. Lee Lan* [1990] 2 MLJ 425; *Government of State of Pahang v. Tengku Abdul Aziz & Anor* [1978] 2 MLJ 34 and *Sundaram v. Chew Choo Khoon* [1968] 2 MLJ 40. These cases can easily be distinguished as the facts and issues involved are not the same as this instant case.

Issues

Learned counsel for the plaintiff raised two preliminary objections. One relates to O. 32 r. 13(2) RHC and the other is the contention that the affidavit used by the defendant is based on hearsay.

The Court of Appeal has determined in *Structural Concrete Sdn. Bhd. & Ors v. Wing Tiek Holdings Bhd. (supra)* that the 14 days referred to in O. 32 r. 13(2) RHC relates to "within 14 days from the date of the filing of the application". Hence the affidavit in support must be filed and served on the other party within 14 days from the date of filing. In this instant case, the affidavit was filed on 20 August 1999 and must therefore be

served on or before 2 September 1999. However it was only served on 10 September 1999, more than seven days beyond the 14 days allowed. In *Ting Hua Yiew v. Ace Commercial Enterprise Sdn. Bhd. (supra)* the affidavit in support was served only three days beyond the 14 days allowed by the rule and that the failure of serving the said affidavit within the time limit allowed, rendered the said affidavit inadmissible. Further there was no application made for an extension of time to serve the affidavit in support. Similarly in *KS Chua & Co v. Chui Miang Chew & Ors (supra)* the court ruled that it was not obliged and indeed precluded from considering any affidavit filed out of the 14-day period unless formal application had been made and granted by the court. As such the affidavit was ignored. The above named cases are authorities which cannot be ignored by this court.

Where the Rules of High Court have provided for a specific manner and time frame for the service of an affidavit intended to be used in support of an application, these rules must be fully observed and complied with. Failure to do so will result in the non compliance of a requirement which has been ruled as an absolute obligation where O. 2 r. 1 of the RHC cannot render much help. Further, the explanation given by the defendant only came after the hearing of the preliminary objections raised by the plaintiff. The filing of the further affidavit deposed by counsel for the defendant was done without due notice to the plaintiff and leave of this court. The plaintiffs were inevitably caught by surprise and it demonstrates the unfortunate approach taken by the defendant to circumvent the RHC.

For the reason outlined above and the fact that the further affidavit was objected to by the plaintiff, this court rules that the affidavit at encl. 27 is inadmissible.

Indeed there is little need for this court to direct the counsel to adhere to procedures, as counsel are expected comply with the RHC. This court is of the view that the objection is justified. Although the intention of the further affidavit is to explain the reason for the delay, the proper procedure would be to apply and secure the approval of this court first. This would enable the views of the plaintiff to be canvassed and this court could decide whether it would exercise its discretion to allow for further affidavit to be filed. Since the plaintiff have completed their submission on the two preliminary objections and since no application was made by the defendant to file further affidavit, this court is of the view that it could not allow the further affidavit to be used in this action.

In the event that this court erred in not accepting the further affidavit at encl. 27, which attempted to 'explain' the delay, it needs to be stressed here that the explanations could not be accepted by this court as firstly, more copies could easily be printed by the defendant as opposed to only four copies as suggested at para. 4 therein. Secondly the alleged 'slight misunderstanding' referred to at para. 7 lacks details thereby depriving this court the opportunity to evaluate its merit. Thirdly, their failure to return the documents expeditiously to Kuala Lumpur is no excuse as solicitors are aware of the provision of O. 32 r. 13(2) of the RHC.

It is worthy to note also that the defendant admitted that no application was made for an extension of time to serve the affidavit in support to the plaintiff. It was also admitted by the defendant that there was clearly a delay in serving the said affidavit to the plaintiff.

On the question of learned counsel for the defendant affirming an affidavit in support of a contentious application, this court, with respect, shares those clear views expressed by learned judges in the cases quoted earlier.

For the reason outlined above, this court will allow the preliminary objections raised and the summons-in-chambers at encl. 18 is hereby dismissed with costs.

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